In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 656

STANLEY S. HERSHEY and RUTH HERSHEY,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

For the taxable years 1950 through 1952, the Commissioner determined income tax deficiencies and assessed fraud penalties against petitioner Stanley S. Hershey,[1] based upon conclusions that in those years he did not report all of his income from his business of collecting scrap metals and selling it to large scrap

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[1] Ruth Hershey is also a petitioner but only by virtue of the fact that she and her husband filed joint returns for the taxable years.

dealers and that he filed false and fraudulent returns with intent to evade income tax.[2] (Pet. App. 1, 21.) The amount of unreported income was determined by the Commissioner to be the amount of petitioner's receipts as disclosed by the records of his principal customer, less the cost of sales as disclosed by the records of his suppliers. (Pet. App. 21.) On his petition for review, the Tax Court entered findings of fact (Pet. App. 2-22) which show a practice whereby petitioner had his principal customer rewrite weight slips so that a portion of petitioner's sales was shown in the name of a fictitious person (H. Jackson). Petitioner received the payments made by the customer for the total sales (either in cash or as credit against loan obligations), and he has in effect conceded that he failed to report the income attributed to the fictitious Mr. Jackson.[3] The Tax Court (Pet. App. 22-33) upheld the Commissioner's determinations, except that it eliminated the fraud penalty for 1950 and reduced the amount of unreported income for 1951 and 1952 by making adjustments in the cost of sales for those years. On appeal, the Ninth Circuit affirmed the Tax

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[2] As to the years 1951 and 1952, the fraud issue determines both the validity of the assessment of fraud penalties and whether the tax deficiencies were barred by the limitations period for assessment and collection of taxes. (See Pet. App. 9.)

[3] On October 29, 1957, the petitioner was convicted, upon his plea of nolo contendere, of the offense of making a false and fradulent income tax return for the year 1951 (one of the years here in issue) and of making a false and fraudulent affidavit relating to doing business under a fictitious name. (Pet. App. 9.)

Court's findings as adequately supported by the evidence. (Pet. App. 34-39.)

Petitioner argues (Pet. 9, 12) that the courts below have permitted the taxation of gross receipts, contrary to the principle that gross income rather than gross receipts is the foundation of income tax liability. This rests upon the assumption (see Pet. 10) that an incorrect amount was used for cost of goods sold in computing the amount of the petitioner's unreported income. Thus, the taxpayer simply points to a factual question—the correctness of the figure representing cost of goods sold—and asks this Court to evaluate the evidence bearing on that question, although it has been carefully considered by both lower courts.

There is no issue meriting further review and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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